(14)

No. 95-1184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL R. GLICKMAN, Secretary,
United States Department of Agriculture,
Petitioner,
v.
WILEMAN BROTHERS & ELLIOTT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE, THE NATIONAL MILK PRODUCERS FEDERATION, AND THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to S. Ct. Rule 37.4, the National Association of State Departments of Agriculture, National Milk Producers Federation, and National Cattlemen's Beef Association, Inc., move for leave to file the attached brief amici curiae in support of the petitioner. Petitioner has consented to the filing of this brief, but respondents have refused consent, necessitating this motion.

Founded in 1915, the National Association of State Departments of Agriculture ("NASDA") is a nonprofit, nonpartisan association of public officials comprised of the executive heads of the fifty state Departments of Agriculture and those from the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's purpose is to better American agriculture

through the development and promotion of sound public policy at the state, territorial, and federal levels and to communicate the vital importance of agriculture to the economy and general welfare of the people of the United States. Many of NASDA's members—the Commissioners, Secretaries, and Directors of the Departments of Agriculture at the state and territorial level from throughout the country—are charged by their respective governments with the responsibility of administering generic commodity promotion programs funded by mandatory assessments similar to the federal programs at issue in this case.

The National Milk Producers Federation ("NMPF"), founded in 1916, is the principal national representative for dairy producers and for the milk marketing cooperatives they own and operate. Milk producers receive substantial benefits from advertising authorized and conducted by the Dairy Promotion and Research Board, an entity created under the Dairy Promotion and Research Act, 7 U.S.C. §§ 4501 *et seq.* The Dairy Promotion and Research Board spends millions of dollars annually promoting dairy products, and these expenditures play an important role in the continuing success of the domestic dairy industry.

The National Cattlemen's Beef Association, Inc. ("NCBA"), which traces its lineage back to 1898, is a Colorado nonprofit corporation that acts as the primary national representative of the domestic cattle industry. Its primary corporate purposes are to protect the cattle industry in the United States, promote the importance of the cattle industry, and provide an official and united voice on issues of importance to cattle producers and feeders. The membership of the NCBA includes participants from all sectors of the cattle and domestic beef industry. NCBA members benefit directly from the promotion programs undertaken by the Cattlemen's Beef Promotion and Research Board, an entity created under the Beef Promotion and Research Act, 7 U.S.C. §§ 2901 *et seq.*

The structure and operation of the Dairy Promotion and Research Board and the Cattlemen's Beef Promotion and Research Board are similar to that of the Nectarine Administrative Committee and Peach Commodity Committee at issue in this case. Indeed, NCBA is a party in *Goetz* v. *Glickman*, No. 96-3120 (10th Cir.), currently pending on appeal, which involves, *inter alia*, a First Amendment challenge to the Beef Promotion and Research Act, similar to the challenge at issue in this case. A similar First Amendment challenge to the Dairy Promotion and Research Act is pending before the Department of Agriculture and the courts. *See In re Gallo Cattle Co.*, NDPRB Docket No. 96-1 (U.S.D.A., filed April 16, 1996), *review pending, Gallo Cattle Co.* v. *USDA*, No. CIV-S-96-1146 DFL JFM (E.D. Cal., filed June 18, 1996). In addition, many of the state generic commodity promotion programs administered by NASDA members throughout the country are similar in operation and effect to the programs challenged in this case.

Government-established generic commodity promotion programs funded by mandatory assessments of the sort at issue in this case are a characteristic feature of the American agricultural economy, at both the federal and state levels. *See* Pet. for Cert. at 25-30. The constitutional analysis endorsed by the Ninth Circuit in this case poses a direct threat to the continuing viability of those programs. Amici do not disagree with the views of the Solicitor General set forth in the petition for certiorari, but believe that respondents' First Amendment challenge can be resolved on a more basic level. For the reasons set forth in the attached brief, amici believe that this case involves government speech rather than government regulation of private speech. Such government speech does not violate the First Amendment rights of those reason-

ably compelled to fund it, even if they happen to disagree with the government's views.

The Solicitor General has indicated that he will not rely on a "government speech" argument before this Court "as an independent ground of decision," although he has stated that the United States "nevertheless believe[s]" that the constitutionality of government-established generic commodity promotion programs funded by mandatory assessments is "reinforced" by the degree to which they further governmental objectives, are characterized by governmental involvement in their development and administration, and involve only an attenuated connection between the generic advertising and individual producers or handlers. Pet. for Cert. at 21-22 n.14. Because the "government speech" argument is directly pertinent to proper resolution of this case, but will not be adequately presented by the parties, amici respectfully move for leave to file the attached brief addressed solely to that argument.

Respectfully submitted,

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QUESTION PRESENTED

Amici will address the following question:

Whether the commercial advertising undertaken by the Nectarine Administrative Committee and the Peach Commodity Committee—entities established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 *et seq.*, to achieve specified governmental objectives, whose members are appointed by the Secretary of Agriculture and whose activities are subject to his supervision and control—is government speech for purposes of the First Amendment.

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INTEREST OF AMICI CURIAE

Founded in 1915, the National Association of State Departments of Agriculture ("NASDA") is a nonprofit, nonpartisan association of public officials comprised of the executive heads of the fifty state Departments of Agriculture and those from the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's purpose is to better American agriculture through the development and promotion of sound public

policy at the state, territorial, and federal levels and to communicate the vital importance of agriculture to the economy and general welfare of the people of the United States. Many of NASDA's members—the Commissioners, Secretaries, and Directors of the Departments of Agriculture at the state and territorial level from throughout the country—are charged by their respective governments with the responsibility of administering generic commodity promotion programs funded by mandatory assessments similar to the federal programs at issue in this case.

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The structure and operation of the Dairy Promotion and Research Board and the Cattlemen's Beef Promotion and Research Board are similar to that of the Nectarine Administrative Committee and Peach Commodity Committee at issue in this case. Indeed, NCBA is a party in *Goetz* v. *Glickman*, No. 96-3120 (10th Cir.), currently pending on appeal, which involves, *inter alia*, a First Amendment challenge to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901 *et seq*., similar to the challenge at issue in this case. A similar First Amendment challenge to the Dairy Promotion and Research Act is pending before the Department of Agriculture and the courts. *See In re Gallo Cattle Co*., NDPRB Docket No. 96-1 (U.S.D.A., filed April 16, 1996), *review pending*, *Gallo Cattle Co*. v. *USDA*, No. CIV-S-96-1146 DFL JFM (E.D. Cal., filed June 18, 1996). In addition, many of the state generic commodity promotion programs administered by NASDA members throughout the country are similar in operation and effect to the programs challenged in this case.

Government-established generic commodity promotion programs funded by mandatory assessments of the sort at issue in this case are a characteristic feature of the American agricultural economy, at both the federal and state levels. *See* Pet. for Cert. at 25-30. The constitutional analysis endorsed by the Ninth Circuit in this case poses a direct threat to the continuing viability of those programs. As explained in the foregoing Motion for Leave to File Brief Amici Curiae, amici seek to file this brief to ensure that the Court has the benefit of the argument that commercial advertising pursuant to such government-established and government-controlled generic commodity promotion programs—designed to achieve specified governmental objectives—is government speech.

STATEMENT

The underlying facts and course of proceedings below are set forth fully in the brief filed by the Solicitor General on behalf of the petitioner and will not be repeated

here. As the Solicitor General explained in the petition for certiorari, the government did not advance in the courts below the argument that the speech at issue here was "government speech," and accordingly does not rely on that argument as an "independent ground of decision" before this Court. Pet. for Cert. at 21-22 n.14.[1]

That fact in no way precludes this Court from deciding the case on that basis. As the Court has explained, " '[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.' " *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446 (1993) (quoting *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991)). Here respondents have presented the claim that generic commodity promotion programs funded by mandatory assessments under the Agricultural Marketing Agreement Act violate the First Amendment rights of those compelled to pay assessments. Such programs are a common feature of the American agricultural economy, and similar programs have been undertaken by state governments. A decision by this Court on respondents' claim will therefore have ramifications beyond the immediate parties, and the Court is not limited in reaching the correct result to the theories those parties have advanced. *See also United States National Bank of Oregon*, 508 U.S. at 447 ("a court may consider an issue 'antecedent to * * * and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief") (quoting *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (adopting ground

[1] The government has raised that argument in other cases presenting the same issue. *See, e.g., United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Goetz* v. *Glickman*, 920 F. Supp. 1173, 1182 (D. Kan. 1996), *app. pending*, No. 96-3120 (10th Cir.).

for decision which "has not been argued by the United States, here or below") (Scalia, J., concurring in the judgment).

SUMMARY OF ARGUMENT

The marketing orders issued by the Secretary—requiring fruit handlers to pay what amounts to a modest user fee for a government program designed to increase sales of their product—do not violate the First Amendment rights of the handlers. The court below reached the wrong result because it asked the wrong question. It erred in analyzing the orders under the test for government restrictions on private commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), because the speech sponsored by the marketing orders is government speech, not private speech, and the orders do not restrict private speech in any way. The handlers are free to speak however they choose on issues involving peaches, nectarines, and plums; the orders in no way interfere with their freedom to speak or associate. Rather than regulate private speech, the orders facilitate government speech. The government frequently engages in speech activities to promote particular policies—whether to discourage smoking, promote Armed Forces recruiting, or encourage energy conservation—and so long as the objective is a permissible one and the means reasonably adapted to promoting it, such activities do not violate the First Amendment rights of those required to share the cost, even if they are tobacco farmers, pacifists, or energy producers opposed to the government's message.

The pertinent questions are whether the entity doing the speaking may properly be considered the government or under the government's control, whether the message is determined by the government, and whether any private individual or entity has been so linked with the speech that it must be viewed as the speech of that individual or entity rather than the government. Here the marketing orders were issued pursuant to statutory authority to

achieve defined government objectives. They are administered under the supervision of the Secretary of Agriculture by committees appointed by him and subject to removal by him at any time. The speaker is therefore plainly the government. The message—commodity promotion—was set in general terms by Congress in the AMAA, *see* 7 U.S.C. § 608c(6)(I), recently reaffirmed in the Federal Agricultural Improvement and Reform Act of 1996 (the "FAIR Act"), Pub. L. No. 104-127, § 501(b), and implemented by the Secretary in the orders themselves, *see* 7 C.F.R. §§ 916.45, 917.39. Finally, the fact that the fruit handlers derive a special benefit from the government speech sponsored under these particular programs fully justifies funding the programs through assessments on those handlers rather than the public at large, and does not alter the First Amendment analysis. Such assessments do not give rise to the sort of close identification that might transform otherwise permissible government speech into impermissible forced private speech.

ARGUMENT

I. GOVERNMENT SPEECH SHOULD NOT BE ANALYZED AS IF IT WERE A RESTRICTION ON PRIVATE SPEECH

The court below analyzed the constitutionality of the generic advertising programs for California peaches, nectarines, and plums under the three-part test for reviewing government restrictions on commercial speech first articulated by this Court in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). *See* Pet. App. 15a-21a. Although there is no question that the speech at issue is commercial speech, and therefore entitled to less protection than most other forms of speech, *see Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2381 (1995) ("pure commercial advertising" enjoys "a lesser degree of protection under the First Amendment"),

the *Central Hudson* test is inappropriate in this context for two reasons:

First, the *Central Hudson* test was developed to analyze *restrictions* on commercial speech, and has been applied by this Court only in that context. *See, e.g., Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993) (employing test in considering whether "to sustain a *restriction* on commercial speech") (emphasis added); *Board of Trustees* v. *Fox*, 492 U.S. 469, 471 (1989) (employing test in considering "whether governmental *restrictions* upon commercial speech are invalid") (emphasis added). No such restriction is at issue here. *See* AMAA, 7 U.S.C. § 608c(10) ("No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product."); FAIR Act, § 501(b)(4), 110 Stat. 1030 ("The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.").[2] The marketing orders simply require handlers to fund a program of advertising designed to expand the market for their product; it should not be analyzed as if it prohibited speech.

Second, the *Central Hudson* test analyzes the constitutionality of government restrictions on *private* speech.

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[2] There is no question that the pertinent provisions of the FAIR Act are fully applicable to this case. The long-standing rule is that a court—including an appellate court—"should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1501 (1994). The FAIR Act also is highly probative of Congress' intent in enacting the AMAA. *See Loving* v. *United States*, 116 S. Ct. 1737, 1749 (1996) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (quotation omitted).

For the reasons set forth below, however, the speech at issue in this case is not private speech but government speech. The fact that those reasonably compelled to fund speech—because they stand to benefit most directly from it—may object to what the government has to say does not give rise to a First Amendment violation.

Like private citizens and corporations, government at various levels regularly contributes its voice to the marketplace of ideas. As the Third Circuit has noted:

> Citizens' tax dollars purchase a considerable amount of "government speech." Not only does the government speak on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention, each time the President of the United States meets with a foreign dignitary, or state department officials enter into arms control negotiations, the government is engaging in expressive activities on behalf of everyone. [*United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).]

See also Block v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (rejecting view that marketplace of ideas is "one in which the government's wares cannot be advertised") (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986); *Student Government Ass'n* v. *Board of Trustees of the University of Massachusetts*, 868 F.2d 473, 482 (1st Cir. 1989) ("In addition to its role as a regulator, the state plays an important role as a participant in the marketplace of ideas."); *American Jewish Congress* v. *City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) ("Speech by the government is common.") (Easterbrook, J., dissenting).

This speech necessarily is paid for by citizens who may or may not agree with the government's message. That fact, however, provides no basis for preventing the government from taking and communicating a position on

issues of public concern, or for any individual to demand the return of his money if he happens to disagree with the government's message.

As this Court explained in *Keller* v. *State Bar of California*, 496 U.S. 1, 12-13 (1990):

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

See also Lee v. *Weisman*, 505 U.S. 577, 591 (1992) ("the very object of some of our most important speech is to persuade the government to adopt an idea as its own").

Furthermore, as a practical matter, effective government would come to a grinding halt if every person had a right to insist that his money not be used to support programs or positions with which he disagrees. *See Block* v. *Meese*, 793 F.2d at 1313 (discussing the "practical problems of excluding the government from ideological debate"); *see also Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992). *Cf. United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Accordingly, the First Amendment simply does not provide a legal basis for objecting to government speech.

The First Amendment limits government interference with *private* speech; it does not limit government speech itself. Thus, while the First Amendment ordinarily prohibits the government from regulating speech on the basis of its content, this Court noted just last year that "we have permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510, 2518 (1995) (emphasis added). As then-Judge Scalia put it in *Block* v. *Meese*: "The short of the matter is that control of government expression * * * is no more practicable, and no more appealing, than control of political expression by anyone else. * * * [T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate." 793 F.2d at 1314 (internal quotation omitted). *See also Brown* v. *Palmer*, 915 F.2d 1435, 1445 (10th Cir. 1990) (First Amendment must not be construed to "unduly chill[]" government speech), *aff'd*, 944 F.2d 732 (10th Cir. 1991) (en banc).

II. THE SPEECH FUNDED PURSUANT TO THE MARKETING ORDERS IS GOVERNMENT SPEECH BECAUSE IT IS UNDERTAKEN PURSUANT TO STATUTORY AUTHORITY TO ACHIEVE GOVERNMENTAL OBJECTIVES BY GOVERNMENT APPOINTEES UNDER THE DIRECTION AND CONTROL OF A GOVERNMENT OFFICER

The first factor to consider in determining whether speech is government speech is the obvious one: who is doing the speaking? This Court provided clear guidance on how to answer that question just last year in *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995). That case makes clear that entities such as the Nectarine Administrative Committee and Peach Commodity Committee are government instrumentalities for First Amendment purposes.

In *Lebron*, the National Railroad Passenger Corporation (better known as Amtrak) refused to allow the petitioner to display an advertisement of a political nature on a large illuminated billboard controlled by Amtrak. *Id.* at 963. The question for the Court was whether Amtrak should be considered part of the Government for First Amendment purposes. The Court's answer was yes. The Court succinctly stated its holding in the final paragraph of its opinion: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 974-975.

The three factors that led this Court to conclude that Amtrak "is part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law; (2) furtherance of governmental objectives; and (3) retention of appointment authority—are all present here and compel the same conclusion with respect to the Nectarine Administrative Committee and Peach Commodity Committee. As to the first factor, the Committees were created by the Government pursuant to special law, the AMAA. *See* 7 U.S.C. §§ 608c(7)(C), 610; 7 C.F.R. §§ 916.20, 917.20 (providing for the establishment of the Committees). Second, the Committees were created "explicitly for the furtherance of federal governmental goals." *Lebron*, 115 S. Ct. at 973. The "federal governmental goal[]" served by the AMAA is to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce," by, among other means, "paid advertising." 7 U.S.C. §§ 602(1), 608c(6)(I).

These "governmental objectives" (*Lebron*, 115 S. Ct. at 974) were reaffirmed with the passage of the FAIR Act. Congress found that "[i]t is in the national public interest

and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs." § 501(b)(1), 110 Stat. 1030, to be codified at 7 U.S.C. § 7401. The promotion programs were found "to further the governmental policy and objective of maintaining and expanding markets for the covered commodities." *Id.* § 501(b)(8)(B), 110 Stat. 1031. The Committees were authorized for the specific purpose of furthering these objectives by recommending to the Secretary an annual budget for administering the marketing order, including a budget for advertising and other promotional activities. *See* 7 C.F.R. §§ 916.31, 917.35; Pet. App. 10a-11a.

As to the third *Lebron* factor, it is clear that the members of the Committees serve "under the direction and control of federal governmental appointees." *Lebron*, 115 S. Ct. at 974. The Secretary of Agriculture appoints all of the members of each Committee, and has the power to remove them at any time, *see* 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30. Again, this point was reaffirmed with the passage of the FAIR Act. *See* § 501(b)(2) (commodity promotion programs are "supervised by the Secretary of Agriculture"); *id.* § 501(b)(8) (commodity promotion programs are "under the required supervision and oversight of the Secretary of Agriculture"). The Ninth Circuit below acknowledged that "[c]ommittee members are appointed by the Secretary and supervised by the Agricultural Marketing Service, an agency within the [USDA]." Pet. App. 4a.[3]

[3] Like the federal program at issue here, many state commodity promotion laws provide that the members of the advisory bodies involved in program administration be appointed by government officials. *See, e.g.*, Cal. Food & Agric. Code § 58841 (Secretary of Food and Agriculture appoints advisory board members, who serve "at the pleasure of" the Secretary); Nev. Rev. Stat. § 556.060 (1)(a) (Board of Agriculture appoints garlic and onion advisory board members and "fix[es] their terms of office"). The state statutes often specify that appointees be drawn from nominations submitted by the affected industry. *See, e.g.*, Fla. Stat. Ann. § 573.112 (Department of Agriculture and Consumer Services appoints advisory council from nominees chosen by producers of the agricultural commodity); Idaho Code § 22-1202 (governor appoints potato commission from nominees chosen by potato growers, shippers, and processors).

Some state advisory groups, however, are not government appointed but selected by industry representatives themselves. That fact alone does not mean that the promotion activity of such groups is not properly characterized as government speech. For example, while 10 of the 11 members of the California Kiwifruit Commission are elected by kiwi producers and handlers, the Secretary of Food and Agriculture retains the authority to order the Commission "to correct or cease any existing or proposed activity or function" in violation of the authorizing statute or contrary to the public interest, and California law expressly states that the Commission is "a state agency operating" "in the state government." Cal. Food & Agric. Code §§ 68051, 68052. The Commission thus can fairly be said to be "under the direction and control" (*Lebron*, 115 S. Ct. at 974) of the State.

The *Lebron* factors are important in classifying the speech at issue as government speech because they determine who the speaker is and who controls the content of the message. As the Third Circuit explained in *Frame* with respect to the Beef Promotion and Research Act:

> The Board and Committee members serve at the pleasure of the Secretary of Agriculture * * *. [T]he Secretary makes the final decisions on all projects funded under the Act. All budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary, and no contracts for the implementation of any plans may be entered into without the Secretary's approval. Thus, when the Board or Committee "speaks," they do so on behalf of the Secretary of Agriculture and the government of the United States. [885 F.2d at 1132 (citations omitted).]

So too here, when the Nectarine Administrative Committee and the Peach Commodity Committee speak, they do so on behalf of the government, and what they say is government speech.

III. THE FACT THAT THE GOVERNMENT SPEECH IS FUNDED BY ASSESSMENTS ON THOSE WHO BENEFIT MOST DIRECTLY FROM IT DOES NOT CHANGE THE NATURE OF THE SPEECH

The Third Circuit in *Frame* ultimately declined to conclude that the speech at issue was government speech because, in its view, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group" there is a "coerced nexus" between the message and the individuals who comprise the group. 885 F.2d at 1132. By contrast, that "nexus between the message and individual is attenuated," the court said, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities." *Id.* That analysis is fundamentally flawed.

The focus of the government speech inquiry is—and should be—on the entity that conveys the message at issue and on the process through which that message has been formulated. The focus is not—and should not be—on whether or to what extent the message might be ascribed to an individual (other than the speaker) as a result of the "nexus between the individual and the specific expressive activity." *Id.* The latter inquiry lacks any firm grounding in established First Amendment doctrine and provides a wholly unworkable rule of decision for distinguishing between government and non-government speech.

The Third Circuit derived its "nexus" analysis solely from footnote 13 of Justice Powell's concurrence in *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977), which provides:

> Compelled support of a private association is fundamentally different from compelled support of government. * * * [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

See 885 F.2d at 1132-33. The pertinent distinction drawn by Justice Powell was not, as the Third Circuit apparently thought, the "nexus" between the individual and the message to which he objects. Instead, the distinction drawn was between being forced to associate with *private* speech—which is derived from "one segment of the population, with certain common interests"—and with *government* speech—which is derived from the government as "representative of the people." *Abood*, 431 U.S. at 259 n.13.

Thus, in determining whether the speech activities at issue in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), constituted government speech, this Court focused on the entity that conveyed the message—the State Bar Association—and *not*, as would have followed under the Third Circuit analysis, the "nexus" between the association's members and the message to which they objected. Because the Court concluded that the association was not like a typical government agency or official, who "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents," *id.* at 12, the Court concluded that the messages it conveyed were not government speech. *Id.* at 13.

By contrast, here it follows under this Court's recent decision in *Lebron* that the entities conveying the message to which handlers object—the Committees—*are* government instrumentalities for First Amendment purposes. Moreover, this case is distinguishable in a second, perhaps

even more fundamental, respect. Here, unlike in *Keller*, the message being conveyed—commodity promotion—was formed in the first instance by *Congress* "as part of the democratic process." 496 U.S. at 12. The Committees were created under authority of the AMAA with the express purpose of conveying that *particular* message to the public. They do so pursuant to precise governmental regulations and subject to the ongoing guidance and control of the Secretary of Agriculture.

No such governmental definition and control characterized the activities of the State Bar in *Keller*. The Court made clear that the messages at issue in that case represented the views of a particular group—the Bar—on a wide and changing array of issues.[4] Here the message at issue was fixed by the representative of all the people—Congress—and is implemented by the Secretary. Although that message may be beneficial to a particular group—which justifies having them fund its dissemination—there is no doubt that it is the government's message.

The government may—and frequently does—use "private entities to convey a governmental message," or "to transmit specific information pertaining to its own program." *Rosenberger* v. *University of Virginia*, 115 S. Ct. at 2519. When it does so, the government speech analysis still applies in analyzing objections to the message or specific information being conveyed by the private entities. *E.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). But this case does not even involve the enlistment of private entities to convey the government's message. Here, the government's message is being conveyed by *government* bodies created by Congress specifically for that purpose

[4] The Bar was alleged to have been engaged in such far ranging—and openly political—activities as "endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing." 496 U.S. at 15.

and placed under the direct supervision of *government* officials like the Secretary. In these circumstances, it simply defies common sense to conclude, as the respondents would have this Court do, that this case does not involve government speech.

Had Congress elected to fund the activities under the program with taxpayer dollars, there would be no question that the program's speech was government speech. Simply because Congress made the decision to defray the program's cost by imposing what amounts to a modest user fee on those "who most directly reap the benefits of the program," FAIR Act, § 501(b)(2)—and who as a group have voted to fund the program—does not change the essential character of the speech. It remains the government's message, with the content specified by Congress and articulated under the guidance and control of the Secretary.

This is a far cry from a case in which the government attempts to compel adherence to its own message, as was the case in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable. The handlers in this case face no such ideological dragooning. The marketing order simply requires a handler to pay a user fee; it neither "compel[s] him to utter what is not in his mind," *Barnette*, 319 U.S. at 634, nor makes him "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked any handler verbally to express *his* support of fruit promotion, as in *Barnette*, or to bear such a message upon *his* property, as in *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant individual is worlds apart from compelling that person to contribute

financially to support government-supervised commercial speech, when that speech directly benefits his own commercial interests. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate as long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.' ") (quoting *Wooley*, 430 U.S. at 717).

Justice Harlan made the same point in *Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (concurring in the judgment):

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

Society frequently calls upon its members to pay taxes, dues, or other assessments to support various organizations and entities, both governmental and non-governmental. But no one thinks that everyone who makes such a payment thereby endorses to the last jot and tittle the agenda of the recipient, because "the connection between the payment of an individual's dues and the views to which he objects is factually so remote." *Id.* at 859.

* * * *

The speech at issue in this case is speech by committees established pursuant to federal law to achieve defined governmental objectives. The members of the committees are appointed by a government officer and are subject to removal by him. Their budgets, plans, projects, contracts, and activities are subject to his approval, supervision, and control. The message that is conveyed by these commit-

tees is the government's message. The fact that it is funded by assessments on those who benefit most directly from the government program—and who have by a vote elected to fund such a program—does not make the speech the forced speech of someone else. It remains government speech, and the fact that some of those compelled to support it—who are free to speak their own mind on the subject—may object to the government's message does not give rise to a First Amendment violation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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